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No. 03-1226

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Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

BOBBY GENE HUNTER, *Petitioner,*

v.

GLENN A. MUELLER, Warden et al., *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Can Petitioner contest the denial of his petition for a federal writ of habeas corpus and of his request for a Certificate of Appealability where the operative facts, as reasonably determined by the state court, and the relevant legal precedent will not support a debate that Petitioner has been denied any constitutional right?

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STATEMENT OF THE CASE

On December 1, 1993, pursuant to a negotiated plea in which his counsel joined, Petitioner Bobby Gene Hunter pled nolo contendere to a charge of second degree murder (Cal. Penal Code §§ 187, subd. (a), and 189)[1/] in the Butte County Superior Court. (CT 11-12, 36-41; RT 8-9.) In an unpublished opinion filed on September 23, 1994, the Court of Appeal of the State of California, Third Appellate District, affirmed Petitioner's conviction. The California Supreme Court denied review.

Some 21 months after the denial of review, Petitioner, represented by counsel, filed a petition for writ of habeas corpus in the Butte County Superior Court, alleging violations of various constitutional rights. An evidentiary hearing on Petitioner's claims was held, following which the court denied the petition on July 14, 1997. Almost a year later, on July 2, 1998, Petitioner, still represented by counsel, filed an

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1. Unless otherwise designated, all statutory references are to the California Penal Code.

unsuccessful petition in the state court of appeal, essentially repeating his claims from the superior court pleading. A third petition filed in the California Supreme Court was denied on March 31, 1999.

On August 9, 1999, Petitioner filed an application for writ of habeas corpus in the United States District Court for the Eastern District of California. On March 18, 2003, that Court denied the application. For the reasons set forth in the magistrate judge's findings and recommendations, the Court subsequently determined that Petitioner had not made a substantial showing of the denial of a constitutional right. Consequently, Petitioner's request for a certificate of appealability was also denied. A second request for a certificate addressed to the United States Court of Appeals for the Ninth Circuit was denied as well.

STATEMENT OF FACTS

The facts of Petitioner's substantive offense were set forth in the unpublished opinion of the state appellate court:

> Oroville police officers were dispatched to Josephine Schain's residence in response to a call of domestic abuse. When they arrived they saw [Petitioner] through a window. He was sitting atop Ms. Schain and hitting her with his fists, repeating "tell the truth." [Petitioner] answered the door when the officers knocked. He looked tired, was sweating heavily, and had a strong odor of alcohol. Ms. Schain had numerous contusions and obvious swelling to her head. She was taken to a hospital and died a few days later from the beating she had received.

People v. Hunter, C017582 (filed September 23, 1994), Slip Opn. at 2.

ARGUMENT

THE COURT OF APPEALS PROPERLY DECLINED PETITIONER'S REQUEST FOR A CERTIFICATE OF APPEALABILITY BECAUSE NEITHER THE FACTS NOR THE LAW SUPPORT ANY DEBATABLE SHOWING THAT PETITIONER WAS DEPRIVED OF ANY CONSTITUTIONAL RIGHT

Petitioner contends that this Court should grant certiorari to determine whether the United States Court of Appeals for the Ninth Circuit erred in denying his request for a Certificate of Appealability ["COA"] in order to obtain review of his claims presented to the District Court on federal habeas. Pet. at 3, 28. Respondent submits that no review is required. Other than his own assertion that he made a substantial showing that he was denied various constitutional rights, Petitioner has not demonstrated that any reasonable jurist would debate whether the Court has misapplied any controlling precedent or that the factual predicate underlying the court's denial was unreasonably determined. To the contrary, the court of appeals acted as constrained by statute to deny a COA where an applicant has failed to make a substantial showing that he has been denied a constitutional right. 28 U.S.C. § 2253(c).

At issue in this case are the standards imposed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2253, before a petitioner may appeal a federal district court's denial of habeas relief. Such an appeal is not automatic, but is governed by the COA requirements found at 28 U.S.C. § 2253(c). *Slack v. McDaniel*, 529 U.S. 473, 478, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000). Under those provisions, a petitioner may not appeal absent a COA, and such a certificate should not issue unless the prisoner makes a

substantial showing that he has been denied a constitutional right. 28 U.S.C. § 2253(c)(2).

This provision is a codification of the standard announced in *Barefoot v. Estelle*, 463 U.S. 880, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983), for determining what constitutes the requisite showing to trigger appellate review of the denial of federal habeas relief. *Slack*, 529 U.S. at 483. Under the *Barefoot* standard, to secure a certificate of probable cause -- the predecessor to the current Certificate of Appealability -- a petitioner was required to show more than the absence of frivolity or the presence of good faith. *Barefoot*, 463 U.S. at 893. Rather, the requisite showing was that reasonable jurists could debate whether the issues should have been resolved differently or that the questions are adequate to deserve encouragement to proceed further. *Id.*; *accord Slack*, 529 U.S. at 484.

In deciding whether to permit a petitioner to initiate appellate review of the denial of his habeas petition, the court of appeals must limit its examination to a threshold inquiry into the underlying merits of the petitioner's claims. *Miller-El v. Cockrell*, 537 U.S. 322, 327, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003), *citing Slack*, 529 U.S. at 481; *Hohn v. United States*, 524 U.S. 236, 118 S.Ct. 1969, 141 L.Ed.2d 242 (1998). In making this decision, the court of appeals is not to impose the standards requiring a petitioner to prove the state court decision was objectively unreasonable, which applies to the granting of habeas relief. *Miller-El*, 537 U.S. at 341. Rather, a petitioner need demonstrate only that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. *Id.* at 338, *quoting Slack*, 529 U.S. at 484. "The question is the debatability of the underlying constitutional claim, not the resolution of that debate." *Miller-El* at 342.

Apply these principles to this case, the court of appeals below correctly declined to issue the COA. That court could justifiably find that Petitioner had failed to demonstrate the debatability of his claims, as they were either without factual

support or even contrary to law. This Court should agree. Petitioner has not made a substantial showing that his plea was involuntary or that he received ineffective assistance of counsel.

A. Validity Of Plea

Petitioner contends the court erred in denying the claim that his due process rights were violated. Pet. at 5. This contention is basically a claim that Petitioner's no contest plea was invalid because he was not advised of the true nature of the charges against him or the consequences of his plea, he was not competent to enter the plea (Pet. at 8) and the trial court failed to ensure that Petitioner understood the charges against him and to advise him of his rights (Pet. at 9). A threshold inquiry into these claims supports the view of the court of appeals that none of these claims would be debatable among reasonable jurists.

To meet the constitutional requirement that a guilty plea must be knowing, intelligent, and voluntary (*Brady v. U.S.*, 397 U.S. 742, 748, 90 S.Ct. 1463, 1469, 25 L.Ed.2d 747 (1970)), and represent a voluntary and intelligent choice among the available alternatives (*Hill v. Lockhart*, 474 U.S. 52, 56, 106 S.Ct. 366, 369, 88 L.Ed.2d 203 (1985)), a defendant must be apprised of the true nature of the charge(s) against him (*Henderson v. Morgan*, 426 U.S. 637, 645, 96 S.Ct. 2253, 49 L.Ed.2d 108 (1976)), and of the consequences of his plea (*Boykin v. Alabama*, 395 U.S. 238, 243-244 (1969)). The record must reflect a knowing and intelligent waiver of the constitutional protections enumerated in *Boykin*. *Id.* at 242-244. And underlying these requirements is the fundamental premise that a defendant be competent to plead. *See Dusky v. U.S.*, 362 U.S. 402, 80 S.Ct. 788, 41 L.Ed.2d 824 (1960) [defendant is competent if he is able to understand the nature of the proceedings and to assist counsel in rational manner]; *also Godinez v. Moran*, 509 U.S. 389, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993) [no higher competency standard for pleading guilty than for standing trial]. Petitioner has made an inadequate

showing that the district court's assessment of these issues was debatable, much less wrong.

1. Competency To Plead

Petitioner contends that the post-conviction evidentiary hearing on his competency to plead was constitutionally inadequate because the judge erroneously allocated to him the burden of proving incompetence rather than to the state the burden of proving competence. He asserts that the state must bear that burden of retrospectively proving competency if the trial court failed to provide a defendant with the constitutionally required competency hearing. Pet. at 10. Petitioner apparently takes the position, relying on *Pate v. Robinson*, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966), that the trial court had a sua sponte duty to hold a hearing concerning Petitioner's competency before taking his plea (Pet. at 11-12):

> In every case where our court or the Supreme Court has addressed the sufficiency of the evidence for making a retrospective determination, we have affirmed the view that the state bears the burden of proving competence.

Pet. at 12. Petitioner mistakes the law.

This Court has expressly acknowledged that due process is not violated by the presumption that a criminal defendant is competent unless he proves otherwise by a preponderance of the evidence. *Medina v. California*, 505 U.S. 437, 445, 112 S.Ct. 2572, 120 L.Ed.2d 353 (1992). Thus, due process does permit a state to require the defendant to bear the burden of proof on the competency issue by a preponderance of the evidence. *Id.* at 442-453. A different result is not warranted simply because the evidentiary hearing arose in the context of a post-conviction hearing on collateral review. Indeed, it is a fundamental tenet of federal habeas litigation that the burden of proving a violation of the Constitution within the meaning of section 2254

rests entirely with the petitioner. *Herrera v. Collins*, 506 U.S. 390, 399-400, 404-405, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993). Because Petitioner's claim of error regarding this post-conviction competency hearing was based largely on the erroneous legal view that the state rather than he had the burden of proof, Petitioner has not shown he was denied a constitutional right.

Nor does Petitioner fare any better with respect to his claim concerning the alleged sua sponte duty of the trial court to test his competency before accepting Petitioner's plea. *Pate* requires such a hearing only if a bona fide doubt of competency arises. *Pate*, 383 U.S. at 384. In making that assessment, the federal court considers only what was before the judge accepting the plea. *Amaya-Ruiz v. Stewart*, 121 F.3d 486, 489 (9th Cir. 1997). In this case, nothing before the trial court would have triggered that inquiry (Pet. Appen. C at 11-12), thus the federal court of appeals could determine there was no debatable issue concerning competency.

Petitioner now contends there was evidence in the probation report that he was under the influence of drugs and unstable. Pet. at 13. However, even assuming that was true, nothing in the report ties this description to the relevant time of the plea. In fact, in the written change of plea form executed by Petitioner, he claimed to be sober and denied that he had consumed any drug or narcotic to the extent his judgment was impaired at that time. (Clerk's Transcript on Appeal ["CT"] 40.) When specifically asked in open court at the time of his plea about his sobriety, Petitioner again denied that he was then under the influence of alcohol or any drug or narcotic or prescription medication. Furthermore, there was nothing about Petitioner's behavior in court that would have triggered the trial judge's suspicion about Petitioner's competence. Absent any grounds to trigger the suspicion, the court of appeals correctly concluded there was no basis for debate on whether the trial judge should have held a *Pate* hearing.

In sum, Petitioner made no showing of fact or law that would have led any reasonable jurist to question whether the competency issue had been resolved correctly. Accordingly, there was no substantial showing he was denied a constitutional right and the COA was properly denied as to this issue.

2. Validity Of Plea Procedure

Aside from the issue of his competence to plead, Petitioner also alleges his plea was constitutionally invalid because he was not advised of the true nature or consequences of his plea and also apparently because the trial court failed to ensure Petitioner understood the charges against him or to advise him of his rights. Specifically, he claims he would not have pled no contest to second degree murder had he known the charge meant he intended to kill the victim (Pet. at 6) or that he killed with malice aforethought (Pet. at 8). He further questions whether the record of plea proceedings affirmatively shows a knowing, voluntary waiver of constitutional rights (Pet. at 8), asserting there is no evidence on the record to show he was aware of the substantive rights enumerated in *Boykin* (Pet. at 10). Respondent submits that Petitioner has offered nothing other than his self-serving assertions to provide any debate concerning these issues.

Starting with this last and most easily disproved claim that he was unaware of the substantive rights enumerated in *Boykin*, the record permits no legitimate debate. First, Petitioner executed a written change of plea form under penalty of perjury in which each of the constitutional rights given up by the plea -- right to a speedy, public trial by jury, right to confront and cross-examine witnesses, right to remain silent unless he chose to testify on his own behalf, and right to present evidence and to subpoena witnesses -- was expressly enumerated. Petitioner initialed separate boxes as to each right indicating both that he understood the right and that he waived it. (CT 38.) Petitioner also initialed that he had read, understood, and initialed those

items, and his attorney signed a statement indicating he had gone over the form with Petitioner and had explained to his client each of his rights and the consequences of the plea. (CT 40.) In court at the plea proceedings, Petitioner affirmed that he had read and understood the plea form prior to initialing and signing it. (Reporter's Transcript on Appeal [RT] 3). Thus, there is no question for reasonable jurists to debate concerning whether Petitioner was aware of his constitutional rights or that he personally -- not counsel -- waived them.

Nor has Petitioner made the requisite showing concerning his lack of knowledge of the nature of the charge to which he pled. Preliminarily, to the extent Petitioner's claim is based on the premise that his admission to second degree murder necessarily meant he intended to kill the victim, this predicate has no basis in California law. Under California law, an unlawful killing with malice is murder, regardless of whether there was an intent to kill. *People v. Lasko*, 23 Cal.4th 101, 108-109 (2000); *People v. Nieto Benitez*, 4 Cal.4th 91, 102 (1992).

As for Petitioner's assertion that he did not know pleading to second degree murder was an admission of malice, Respondent submits this bare bones assertion provides no basis for debate in light of the contemporaneous record. In his signed statement accompanying Petitioner's written change-of-plea form, Petitioner's attorney indicated, among other things, that he had explained the elements of the offenses. (CT 40.) In court, counsel affirmed that he had explained to Petitioner what the prosecution had to prove in order for Petitioner to be found guilty of the admitted charge. (RT 4.) Under this Court's precedent, even without counsel's representation on the record, it is presumed that defense counsel routinely explain to the client the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit. *Henderson v. Morgan*, 426 U.S. at 647; *accord Marshall v. Lonberger*, 459 U.S. 422, 436-437, 103 S.Ct. 843, 74 L.Ed.2d 646 (1983).

Nor did Petitioner strengthen his showing in state post-conviction proceedings. There, trial counsel testified that, on several occasions, he discussed with Petitioner the distinctions between murder and manslaughter and also explained both malice and intent to kill. Pet. Appen. C at 9-10. At that hearing, he offered a letter from his trial file containing extensive briefing on the elements of both murder and manslaughter and on how the specific facts of Petitioner's case pertained to those elements. Against the contemporaneous record and the post-conviction testimony indicating that he had been advised of the nature of the charges against him, Petitioner offers only his denial that it happened in support of his claim that his plea was unknowing. Pet. at 8.

The substance of this showing pales in comparison to that of the petitioner in *Miller-El* in support of his contention that the jury selection procedures at his trial violated the Equal Protection Clause and this Court's holding in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). In *Miller-El*, the petitioner showed a statistical disparity along racial lines in the exclusion rate of jurors, an objective basis to question the proffered race-neutral rationales for striking certain jurors, evidence of the state's racially disparate questioning, and historic evidence of racial discrimination by that particular prosecution office. *Miller-El*, 537 U.S. at 342-347. In view of the substantial evidence demonstrating that the peremptory strikes were exercised in the case on race-based grounds, this Court concluded that a COA should have issued. *Id.* at 341, 348. While the significance of the *Miller-El* evidentiary showing was debatable, the existence of those facts was without dispute. Not so in Petitioner Hunter's case. Respondent submits that Petitioner's showing was inadequate to even raise a question as to the knowing, voluntary, and intelligent nature of his plea. Accordingly, the court of appeals properly denied Petitioner's request for a COA on this issue.

B. Effective Assistance Of Trial And Appellate Counsel

Petitioner asserts he was deprived of effective assistance of counsel in several particulars, which presumably led to his plea and conviction. Pet. at 14-25. He argues further that his appellate counsel also rendered ineffective assistance, basically for failing to pursue certain claims on collateral review. Pet. at 25-28. Neither contention presents a debatable question. Petitioner has shown neither deficient representation nor prejudice based on trial counsel's performance. Nor has he shown that appellate counsel breached any duty required by the federal Constitution.

The standard for considering claims of ineffective assistance of counsel is well settled. It requires a two-step process. *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). First, Petitioner must identify acts or omissions that fall below an objective standard of reasonableness. *Id.* at 688. Second, if some deficiency is shown, Petitioner must affirmatively show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694. To establish prejudice in the context of an alleged involuntary plea based on ineffective assistance of counsel, Petitioner must show a reasonable probability that, but for counsel's errors, Petitioner would not have pled guilty -- or here, no contest -- but would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. at 58-59. If Petitioner can not demonstrate prejudice, a reviewing court may reject the incompetency claims without evaluating counsel's performance. *Strickland*, 466 U.S. at 694. In this case, denial of a COA on Petitioner's IAC claim was warranted because not even a debatable question of prejudice was shown.

1. Trial Counsel

Petitioner recites a litany of trial counsel's alleged performance shortcomings, including: failure to communicate with Petitioner throughout court proceedings; failure to investigate Petitioner's mental state or argue for a diagnostic evaluation (Pet. at 14); failure to correctly advise Petitioner concerning mandatory lifetime parole (Pet. at 16-17); counsel's assorted preparation failures, but for which Petitioner would have accepted an offer of voluntary manslaughter (Pet. at 18-20); and possibly that counsel dismissed all possible defenses, though Petitioner told him he never intended to kill or harm the victim (Pet. at 20-25). But before considering these varied allegations, Respondent urges this Court to consider the representations Petitioner made at the time of his plea.

This Court has instructed that, while not insurmountable, the representations of the defendant, his attorney, and the trial court at the time of the plea constitute a "formidable barrier," that such declarations in open court carry a strong presumption of verity. *Blackledge v. Allison*, 431 U.S. 63, 73-74, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977). In *Blackledge*, this Court concluded that a subsequent presentation of conclusory allegations and contentions that are wholly incredible in the face of the record are subject to summary dismissal. *Id.* at 74. Because Petitioner's claims concerning his trial counsel's performance fall well within this description of "conclusory" and "incredible" in the face of the state record, the court of appeals properly subjected them to the approved summary dismissal by not issuing a COA.

As Respondent has previously noted, trial counsel signed a declaration in which he represented to the trial court that he had discussed the facts of Petitioner's case with him and had explained the elements of the offenses and his possible defenses. (CT 40.) Counsel represented in court that he had explained to his client what the prosecution needed to prove in order for Petitioner to be found guilty. (RT 4.) Petitioner

indicated, in turn, that he had no questions about the negotiated disposition and that he had had enough time to talk to his trial attorney. Petitioner assured the court he was certain that the negotiated disposition was how he wanted to proceed. (RT 4.) As for the terms of the plea itself, the prosecutor recited, and trial counsel concurred, that Petitioner would plead to a stipulated count of murder in the second degree. (RT 2.) Petitioner agreed that this was also his understanding of the negotiated settlement (RT 3) and expressly denied that *anyone* had made any other promise or representation to induce the plea[2/] (RT 3-4). Both the prosecutor and trial counsel also denied being aware of any other promises or representations made to Petitioner. (RT 4.) Furthermore, even though the preprinted change-of-plea form misadvised Petitioner as to one consequence of the plea -- the length of parole he faced -- the court correctly explained without any objection from Petitioner that parole would be for life. (RT 9.) Petitioner's lack of objection may be explained by the fact that his counsel correctly told him about the lifetime parole. At the state evidentiary hearing, counsel maintained that he did advise Petitioner of the lifetime parole consequence, and the state court found counsel's testimony credible. Pet. Appen. C at 10, 15-16.

Based on the foregoing, the court of appeals could dismiss out of hand those claims concerning counsel's failure to consult with Petitioner, his failure to explain the elements or possible defenses, or the alleged offer to plead to voluntary manslaughter. Not only do Petitioner's current contentions contradict his statements at the time of the plea, but they also lack evidentiary support except for Petitioner's unsubstantiated allegations. No COA was warranted.

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2. At the evidentiary hearing held in connection with state collateral proceedings, even Petitioner had to concede he had never heard directly from the district attorney any offer to plead to voluntary manslaughter. Pet. Appen. C at 14-15.

Similarly, unavailing is the complaint that counsel failed to investigate Petitioner's mental state as influenced by medication. This argument is apparently based on Petitioner's mental state at the time of the plea (Pet. at 14-16), rather than at the time of the offense, in that there was no evidence presented that Petitioner was on any medication at that earlier time. *See* Pet. at 10-11 [referring to drug being prescribed by jail doctor]. But again, Petitioner's own contemporaneous statements defeat this claim. On the written plea form, he initialed the box indicating he was then sober and had not consumed any drug or narcotic within the past 24 hours to the extent his judgment was impaired. (CT 40.) Not only did Petitioner acknowledge at the change-of-plea proceeding that he had read and understood what he initialed on the plea form (RT 3), but when asked again in court, he denied to the judge that he was then under the influence of alcohol or any drug or narcotic or prescription medication (RT 4). Under *Blackledge*, the claim concerning Petitioner's mental state could be summarily dismissed.

In any event, regardless of whether counsel should have investigated Petitioner's mental state, Petitioner can not demonstrate prejudice. There was an extensive evidentiary hearing in state court on this point, after which the judge specifically found that Petitioner was not under the influence of the prescribed medication to the extent it would interfere with his ability to make a knowing, voluntary, and intelligent plea. Pet. Appen. C at 12. Petitioner offers nothing to show the result would probably have been different had counsel acted as Petitioner suggests. Absent that reasonable probability, no prejudice is shown. More to the point, absent any evidence to support that counsel's asserted error made a difference, Petitioner can not meet his burden to raise a debatable issue to settle on appeal.

Based on all of the foregoing, the COA was correctly denied as to trial counsel's claimed ineffective assistance. Under the facts as reasonably determined by the state court and

presumed correct by the federal district court, there is no basis for reasonable jurists to question the outcome.

2. Appellate Counsel

Respondent has no quarrel with the underlying premise that Petitioner was entitled to effective assistance of appellate counsel. *Jones v. Barnes*, 463 U.S. 745, 751, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). And, there is no question that the *Strickland* standard also applies to appellate counsel. *Smith v. Robbins*, 528 U.S. 259, 285, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000). However, there can be no ineffectiveness where there is no constitutional right to counsel. *Coleman v. Thompson*, 501 U.S. 722, 752, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). That right now extends to trial and first appeal, as of right, but not to state or federal collateral proceedings. *Pennsylvania v. Finley*, 481 U.S. 551, 555, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987). Thus, to the extent Petitioner's complaint against appellate counsel focuses on counsel's refusal to pursue state or federal collateral proceedings (Pet. at 27 ["Counsel never requested an expanded appointment to do a habeas petition at the state level, . . ." "counsel had been directed that a federal habeas petition should be filed"]), then he has failed to demonstrate he was denied a constitutional right.

Similarly, Petitioner has failed to identify deficient performance in or prejudice from counsel's performance in connection with the direct appeal. Petitioner's observation that, because of a heavy case load, counsel asked for extensions of time to file his brief does not identify an act outside the range of reasonable professional conduct. Nor yet has Petitioner identified any prejudice that flowed from counsel's request; the brief was filed and the state court entertained the appeal. Pet. Appen. C at 3. As for Petitioner's complaint that appellate counsel failed to raise the issues in the current writ (Pet. at 26, 27), even he recognizes that claims based on evidence outside of the record could only be reached by way of habeas petition

(Pet. at 26), and as Respondent has already argued, there is no constitutional right to counsel in collateral proceedings. *Pennsylvania v. Finley*, 481 U.S. at 555. Besides, counsel have no constitutional duty to raise on appeal every non-frivolous issue requested by a client. *Jones v. Barnes*, 463 U.S. at 751. Finally, counsel's asserted delay in sending Petitioner's entire appellate file, even if true,[3/] has obviously resulted in no identifiable harm, Petitioner's conclusory claim to the contrary (Pet. at 27, 28) notwithstanding. Petitioner has not shown that the delay hindered his ability to defend or appeal. He has been able to pursue his claims in both state and federal collateral proceedings. Pet. Appen. B, C. Further, it appears that the factual predicate for his claims remained the same as in state superior court, or before counsel allegedly returned the entire file. *See* Pet. Appen. C at 12. In any event, those claims have been rejected, not because they were untimely, but because the court found they lacked merit. Accordingly, Petitioner has not demonstrated a prima facie case showing ineffective assistance on the part of appellate counsel.

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3. The credibility of Petitioner's claim that counsel failed to send the appellate file until 1998 such that Petitioner could not proceed with this petition (Pet. at 27) is suspect. Petitioner did raise the same claims presented in this petition in the Butte County Superior Court in October of 1996. That court conducted an extensive evidentiary hearing before denying the petition in July of 1997. Pet. Appen. C at 3.

CONCLUSION

For the reasons stated, the court of appeals correctly concluded that Petitioner did not make a substantial showing he had been denied any constitutional right where he failed to present sufficient evidence to raise a debatable question in the minds of reasonable jurists that the district court's resolution of the issues was wrong. Therefore, Petitioner's request for a COA was properly denied, and this Court should deny the petition for certiorari.

Dated: April 23, 2004

Respectfully submitted,

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Counsel for Respondent

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ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS F OR THE NINTH CIRCUIT

**BRIEF IN OPPOSITION TO PETITION
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CERTIFICATE OF SERVICE

I, Wanda Hill Rouzan, a member of the Bar of this Court, hereby certify that on this 23rd day of April, 2004, a copy of Brief In Opposition To Petition For Writ of Certiorari, in the above-captioned case was mailed, via first class postage prepaid, in the United States Postal Service to:

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All persons required to be served have been so served.

Dated: April 23, 2004

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